Cellco Partnership d/b/a Verizon Wireless *and* Sara Parrish. Case 28–CA–145221

July 22, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On February 24, 2017, the National Labor Relations Board issued a Decision and Order in this proceeding, affirming in part and reversing in part Administrative Law Judge Mary Miller Cracraft's decision, finding that the Respondent violated Section 8(a)(1) of the Act by maintaining certain work rules in its 2014 and 2015 Codes of Conduct. *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38 (2017).[1]

On March 6, 2017, the Charging Party petitioned for review of the Decision and Order with the United States Court of Appeals for the Ninth Circuit, and the Respondent petitioned for review with the United States Court of Appeals for the District of Columbia Circuit. On May 22, 2017, the U.S. Judicial Panel on Multidistrict Litigation randomly selected the Ninth Circuit as the court to review the case. On May 30, 2017, the Board filed a cross-petition for enforcement with the Ninth Circuit.

On September 7, 2018, the Ninth Circuit granted the General Counsel's motion to sever and remand in full the Charging Party's petition for review and all but one of the issues in the Respondent's petition for review and the General Counsel's cross-petition for enforcement, for reconsideration in light of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017). On August 29, 2019, the Board issued a Notice to Show Cause why the remanded allegations should not be remanded to an administrative law judge for further consideration under *Boeing*.[2] On January 30, 2020, the Ninth Circuit granted the General Counsel's unopposed motion to remand the sole remaining allegation that was still before the court, for reconsideration in light of the Board's decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019).

On May 18, 2020, the Board issued an Order Remanding and Notice to Show Cause in which the Board severed and retained two complaint allegations affected by the Board's decision in *Caesars Entertainment*.[3] Specifically, the two retained issues are whether the Respondent violated Section 8(a)(1) of the Act by maintaining Section 1.6 and Section 3.4.1 of its 2014 and 2015 Codes of Conduct, both of which restrict employees' use of the Respondent's IT systems.[4]

In *Caesars Entertainment*, the Board overruled *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and announced a new standard that applies retroactively to all pending cases in which it is alleged that, as here, an employer violated the Act by maintaining rules restricting the use of its IT resources for nonwork purposes. 368 NLRB No. 143, slip op. at 1–9. The *Caesars Entertainment* standard states, in relevant part, that "an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination." Id., slip op. at 8. Under this limited exception, employees are permitted to access their employer's IT resources for nonbusiness use, even absent discrimination, where the employees would otherwise be deprived of any reasonable means of communicating with each other. Because the parties did not previously have an opportunity to address whether this exception to the rule of *Caesars Entertainment* applies to the facts of this case, the Board issued a notice to show cause why the retained allegations should not be remanded to the judge for further proceedings in light of *Caesars Entertainment*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

The Respondent and the Charging Party filed responses to the notice to show cause, and the Respondent also filed a reply.[5] The Respondent opposes remand, asserting that the severed allegations are squarely lawful under *Caesars Entertainment* and that the Charging Party has not given any indication that she intends to argue that the narrow exception to *Caesars Entertainment* applies to this case. The Charging Party supports remand in order to litigate whether the Respondent has legitimate business justifications for the rules restricting use of its IT systems.[6] In its

[1] On April 21, 2017, the Board issued an Order Denying Motions for Reconsideration of the Decision and Order.

[2] On August 30, 2019, the Board issued a Corrected Notice to Show Cause setting forth the deadline for the filing of responses.

[3] The rest of the allegations were remanded to the administrative law judge for further proceedings.

[4] Sec. 1.6 prohibits "the use of company resources at any time (emails, fax machines, computers, telephones, etc.) to solicit or distribute." Sec. 3.4.1 prohibits employees from using the Respondent's email, instant messaging, Intranet, or Internet systems to transmit "offensive" or "harassing" content and "chain letters," "unauthorized mass distributions," and "communications primarily directed to a group of employees inside the company on behalf of an outside organization."

[5] The General Counsel did not file a response.

[6] We find no merit in the Charging Party's unexplained request to recuse all Board members from this case. Insofar as the Charging Party objects to Member Emanuel's participation in any case applying *Caesars Entertainment*, Member Emanuel addressed his participation in the

reply, the Respondent notes that the Charging Party has not contended in its response that the Respondent's IT systems are employees' only reasonable means of communication or that she would put forth any evidence or argument in support of that position if the case were remanded.

We agree with the Respondent that remand is not appropriate here and that further proceedings before the judge would serve no purpose.[7] Because there is no indication in the record that the Respondent's employees do not have access to other reasonable means of communication, and no party contends that the Respondent's IT systems furnish the only reasonable means for employees to communicate with one another, we find that the Respondent did not violate Section 8(a)(1) by maintaining Sections 1.6 and 3.4.1 of its 2014 and 2015 Codes of Conduct. See *T-Mobile USA, Inc.*, 369 NLRB No. 90, slip op. at 1 (2020).

ORDER

The severed and retained complaint paragraphs relating to Sections 1.6 and 3.4.1 of the Respondent's 2014 and 2015 Codes of Conduct are dismissed.

Dated, Washington, D.C. July 22, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

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Caesars Entertainment decision itself. See 368 NLRB No. 143, slip op. at 3 fn. 11; see also *Verizon Wireless*, 369 NLRB No. 108, slip op. at 1 fn. 3 (2020).

[7] The Charging Party's request for a remand in order to litigate whether the Respondent has legitimate business justifications for the rules restricting use of its IT systems is without merit. In *Caesars Entertainment*, the Board balanced employees' NLRA rights and employers' interests to establish generally that employers may lawfully restrict employees' nonbusiness use of their IT systems, unless the restriction is discriminatory or there are no other reasonable means of communication for the employees. The Board does not conduct this balance anew in each case.